

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



January ) March 2001

## OPINIONS

January 30, 2001

### ALCOHOLIC BEVERAGES LIQUOR BOARDS

**Question:** A provision of the State alcoholic beverages law applicable to Montgomery County requires affirmative action by at least three members of the five-member Board of License Commissioners (the "Liquor Board") to either grant or deny a liquor license. Another statewide provision calls for approval of a license application *unless* a liquor board makes certain findings against the applicant.

Do these two provision conflict and, if so, which controls?

**Answer:** The two provisions, properly construed, can be harmonized. If three members of the Liquor Board are unable to agree on *either* issuance *or* denial of a license and to make the requisite findings, the Board should defer action on the application until a future meeting. Absent members of the Board may be present at a reconvened meeting, or members who were initially present may have reconsidered the matter, and three members may then concur.

If the reason for inability to obtain agreement of three members is that one or more members assert conflicts of interest, the Board may invoke the "rule of necessity," which would allow those members to participate in a decision.

Finally, if the Board's failure to act continues for an unreasonable period, or is attributable to Board vacancies, an applicant may apply for a writ of mandamus.

*Opinion No. 01-004*

**Question:** Do the "premises" of an alcoholic beverages licensee include the parking lot of a shopping mall where the licensee is only one of multiple tenants?

**Answer:** No.

*Opinion No. 01-010  
March 12, 2001*

### CONSTITUTIONAL LAW SEARCH AND SEIZURE

**Question:** Under Transportation Article §25-111(h), police officers and other specified State officials are authorized to enter premises of a motor carrier during normal business hours, to inspect equipment and to review and copy records related to the carrier's compliance with various State and federal regulatory programs.

Is an unannounced inspection under this provision constitutional?

**Answer:** TR §25-111(h) is constitutional and provides adequate notice that equipment and records on the premises of motor carriers are subject to limited inspections without a warrant or specific advance notice.

*Opinion No. 01-005  
February 15, 2001*

## CORRECTIONS

**Question:** What is the parole eligibility of an inmate serving a “straight” life sentence – that is, a sentence of life imprisonment without any portion suspended and without any prohibition against parole? Specifically, must the parole eligibility date of such an inmate be adjusted by the application of diminution credits allowed under Correctional Services Article §3-701 *et seq.*?

**Answer:** Diminution credits must be deducted in computing the parole eligibility date of an inmate serving a straight life sentence. Ordinarily, an inmate serving such a sentence becomes eligible for parole consideration in 15 years, as adjusted by any diminution credits to which the inmate is entitled. If the inmate is serving a life sentence as a result of a failed application for the death penalty, the inmate may not be paroled for 25 years, as adjusted by diminution credits.

*Opinion No. 01-002  
January 25, 2001*

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**COUNTIES  
TAX REFUND**

**Question:** Does the Wicomico County Council have power to refund a transfer tax assessed and collected under emergency legislation that was subsequently rejected by the voters at a referendum?

**Answer:** The County currently lacks authority to grant such a tax refund. However, the General Assembly could amend the County’s taxing authority to permit a refund or tax credit related to payments made under the rejected legislation.

*Opinion No. 01-008  
February 15, 2001*

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**HEALTH  
MEDICARE**

**Question:** Chapter 565, Laws of Maryland 2000 created a temporary prescription drug benefit plan for those senior citizens in Maryland who are eligible for, but not served by, the Medicare Plus Choice program, part of the federal Medicare program offering prescription drug benefits.

What effect would the sunset provision in this State law have if Congress were to create a more comprehensive federal prescription drug benefit program, available only to individuals not covered by a state plan?

**Answer:** The General Assembly created the State plan as a temporary measure for the benefit of seniors affected by the decisions of certain managed care programs not to participate in the Medicare program. The General Assembly included the sunset provision to end the temporary State plan on the creation of a federal plan covering the same population. If Congress limits a new federal program to seniors not covered by a state program, we cannot say with certainty whether the sunset provision in the Maryland plan would allow Maryland seniors to qualify for the new federal program.

*Opinion No. 01-003  
January 30, 2001*

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**Question:** Are senior citizens who live in counties not designated as “medically underserved” by Health General Article §15-106(f) eligible to participate in the temporary prescription drug benefit plan created by Chapter 565, Laws of Maryland 2000?

**Answer:** Yes, if they live in a county or portion of a county that was served by a Medicare Plus Choice plan before January 1, 2000, but is no longer served by such a plan.

*Opinion No. 01-006  
February 15, 2001*

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**LANDLORD AND TENANT**

**Question:** When rental property to be repossessed is an apartment in a multi-unit building, must the summons be posted on the individual apartment?

**Answer:** Statutes governing service of process in summary ejectment actions require that the process server affix an attested copy of the summons conspicuously upon the property to be repossessed ) that is, the individual apartment.

*Opinion No. 01-007  
February 15, 2001*

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### **NATURAL RESOURCES**

**Question:** Concerning the application of the Forest Conservation Act to local government projects in Allegany and Garrett Counties, does the use of State funds to support those projects render the projects subject to the Act despite the statutory exemption for counties with a certain level of forest cover?

**Answer:** The Forest Conservation Act does not apply to local government projects ) even those involving State funds ) in counties exempt from the Act.

*Opinion No. 01-011  
March 13, 2001*

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### **PROPERTY TAX**

**Question:** Does the Truth in Taxation Act, adopted in 2000, have any impact on the annual charge imposed on real property in Columbia by the Columbia Park and Recreation Association, Inc.?

**Answer:** No.

*Opinion No. 01-009  
March 6, 2001*

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## **ZONING AND PLANNING**

**Question:** May the Maryland Department of Planning intervene in local land use decisions and, if so, what are the parameters of that authority?

**Answer:** State law confers broad authority on the Department to intervene, or otherwise to make the State's views known, in local land use proceedings.

*Opinion No. 01-001  
January 16, 2001*

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## **ADVICE LETTERS**

### **ADMINISTRATIVE LAW JUDGES MANDATORY RETIREMENT AGE**

**Question:** Could proposed legislation, which would authorize the Governor to appoint administrative law judges ("ALJs"), also mandate the retirement of ALJs at age 70, or would the mandatory retirement provision offend the federal Age Discrimination in Employment Act?

**Answer:** A gubernatorily-appointed ALJ would be an appointee at the policymaking level and, as such, exempt from ADEA restrictions on mandatory retirement.

*Letter to  
Delegate Joseph F. Vallario, Jr.  
Delegate John F. Wood, Jr.  
January 15, 2001*

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## **CAMPAIGN CONTRIBUTIONS**

**Question:** Do the dollar limits imposed by State election law on contributions and transfers to a candidate's political committee apply regardless of the number of campaign finance entities formed to support the candidate?

**Answer:** Yes.

*Letter to  
Hon. Donald B. Robertson  
January 8, 2001*

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#### **CIVIL PENALTIES COMMUNITY IMPACT OFFENSES**

**Question:** Is HB 327 (2001), the Community Compensation for Community Impact Offenses Act, which would provide that a community association may bring an action for a "civil penalty" against a person who commits a community impact offense within the boundaries of the community association, constitutional?

**Answer:** HB 327 would amend Courts and Judicial Proceedings Article §4-401 to add a proceeding for adjudication of a civil penalty for community compensation, in an amount up to \$50,000, to the list of proceedings that are within the jurisdiction of the District Court. Because the law also allows for transfer of cases to the circuit court upon request for a jury trial, it comports with the jury trial guarantee in Article 23 of the Maryland Declaration of Rights. The civil penalty that can be imposed under the bill is not so punitive in purpose or effect as to negate the statutory intent that it be civil in nature, and therefore the bill does not implicate constitutional limitations against double jeopardy or other protections available to criminal defendants. (HB 327 did not pass.)

*Letter to  
Delegate William H. Cole, IV and  
Delegate Kenneth C. Montague, Jr.  
February 22, 2001*

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#### **CIVIL RIGHTS DISCRIMINATION**

##### ***Employer Liability***

**Question:** SB 205 (2001) includes a prohibition against employment discrimination on the basis of sexual orientation. An amendment to the bill makes employers immune from "liability ... arising out of the employer's reasonable acts to verify the sexual orientation of any employee or applicant taken by the employer in response to a charge filed against the employer on the basis of sexual orientation." What legal impact will the amendment have, and what is the meaning of the term "reasonable acts"?

**Answer:** The "reasonableness" of an employer's acts under this language will be governed in large part by the substance of the charges filed against the employer. Immunity will not apply unless the employer's conduct is triggered by a filed charge. The amendment will not totally eliminate employees' common law privacy rights, and how employer protection and employee privacy are balanced under the bill will likely be determined by courts on a case-by-case basis. Courts may look to the common law governing conditional privileges in invasion of privacy cases.

*Letter to  
Delegate Samuel I. Rosenberg  
March 29, 2001*

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##### ***Free Exercise Clause***

**Q1:** If legislation barring discrimination based on sexual orientation were enacted, would it violate the free exercise rights of individuals or religious institutions, under either the compelling state interest or the rational basis test?

**A:** Courts presented with challenges to legislation based on the Free Exercise Clause of the First Amendment use a rational basis test, except in discrete types of cases. While a court might find a

particular application of an anti-discrimination statute unconstitutional under a compelling state interest test, the exemptions in the proposed legislation likely eliminate most, if not all, such applications. In any event, if application of the proposed legislation in any particular situation were to present serious constitutional issues, a court would most likely not invalidate the statute, but simply construe it not to apply in the particular circumstances.

**Q2:** Would the Court of Appeals be likely to apply the compelling state interest or the rational basis test in assessing this legislation?

**A:** Like the federal courts, the Court of Appeals would likely apply a rational basis standard to assess most applications of the statute under the Free Exercise Clause. There is little recent case law construing a parallel provision of the State Constitution guaranteeing religious freedom, and therefore little basis for predicting which standard the Court would apply under that provision. A reasonable argument can be made that the Court should apply the same standard as under the Free Exercise Clause.

*Letter to  
Delegate Samuel I. Rosenberg  
January 29, 2001*

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### ***Preemption***

**Question:** Would SB 205 (2001), the Antidiscrimination Act of 2001, preempt existing local laws that prohibit discrimination on the basis of sexual orientation?

**Answer:** No.

*Letter to  
Senator Christopher Van Hollen  
March 22, 2001*

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## **COMMERCE CLAUSE**

### ***Internet Privacy***

HB 14 (2001) provides, among other things, that a merchant may not collect or maintain records of personal information concerning an individual, unless the merchant provides the individual with conspicuous notice of the type of information that will be collected, how the information will be used, and who will have access to the information, and unless the individual affirmatively consents. The bill also prohibits the sale or distribution of any personal information collected, unless the merchant provides notice and obtains the affirmative consent of the individual. The merchant must provide a simple on-line method for the individual to revoke this consent.

**Q1:** Does the bill raise Commerce Clause and personal jurisdiction issues?

**A:** While it is clear that the State has a compelling interest in protecting the privacy of its citizens, and that the Internet and personal information collected from it are instruments of commerce, it is less clear whether the bill raises Commerce Clause problems. In prior cases, local regulation of the content of Internet websites has been found to violate the Commerce Clause. The reasoning in those cases indicates that HB 14 would raise substantial Commerce Clause problems if it were applied broadly with respect to persons who merely visit a merchant's website. However, the bill could likely be enforced with respect to a consumer with whom a merchant enters into a transaction or with whom the merchant has a continuing relationship, because in those cases the merchant would be aware that the consumer lived in Maryland and could provide notices directly to the consumer. Furthermore, while application of the bill might also raise personal jurisdiction issues in particular cases, these are not sufficient to render the bill facially invalid.



**Q2:** Are provisions of the bill preempted by federal law?

**A:** The only federal law that currently expressly regulates the collection and distribution of information by website operators is the Children's Online Privacy Protection Act, in part regulating the collection and use of information from websites that target children under the age of 13. The Act appears to contemplate preemption only in the event of conflict between state or local and federal regulation of website operators. FTC regulations implementing the Act provide a safe harbor for a website that complies with an industry self-regulatory guideline approved by the FTC. Application of the privacy provisions in HB 14 would most likely be preempted only to the extent of conflict with federal privacy restrictions under the Act, or to the extent that a website was complying with a safe harbor program.

*Letter to  
Delegate Anthony G. Brown  
February 15, 2001*

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### ***Telephone Solicitation***

**Question:** HB 581 (2001) provides that a person engaged in telephone solicitation may not intentionally act to prevent the transmission of the solicitor's telephone number to persons being called. Does the bill violate the Commerce Clause?

**Answer:** Exceptions are made in the bill for units of government and for solicitors that have preexisting business or personal relationships with, or the consent of, the person who is being called, and the definition of telephone solicitation specifically limits the scope of the bill to instances where there is an organized "activity, program or campaign to communicate by telephone with residents of Maryland." Because the proposal does not prevent any person from soliciting business in Maryland, and because it regulates even-handedly, it does not discriminate against and has only incidental effects on interstate commerce.

Therefore, HB 581 does not violate the Commerce Clause.

*Letter to  
Delegate Elizabeth Bobo  
March 6, 2001*

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### **COMMUNITY ASSOCIATION RECORDS**

**Question:** Does a director of a homeowners association have a right of access to association records, including confidential written advice of legal counsel?

**Answer:** If the association's declaration, by laws, and written policies do not cover the matter, and especially if there is no evidence that the director's request is grounded in improper motives, a director of the association likely has a common law right of access to association records in the association's custody. This right would reach a confidential opinion letter from the association's counsel.

*Letter to  
Delegate Robert C. Baldwin  
March 12, 2001*

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### **FAMILY LAW INVESTIGATION OF CHILD ABUSE**

**Q1:** In connection with an investigation of alleged child abuse, to what extent must a local department of social services and a police department investigate possible victimization of other children who may have had contact with the alleged abuser in a different context?

**A:** The agencies are obligated to make a "thorough investigation" of abuse allegations within a brief time period. They must take precautions to protect the child who is the subject of alleged abuse and other children currently in the care and custody of the alleged abuser. If the alleged abuser has had contact with children in a setting other than the one in which the complaint arose, and if there is reason

to believe that other children may have been abused or may remain at risk, the investigator should inquire about the extent of any contact and the defendant's conduct in that setting.

**Q2:** Does the fact that an accused abuser is a juvenile limit the investigation?

**A:** No, except that in determining whether to classify an act as abuse, or to identify a child as an abuser, a local department may take into account the age of the alleged abuser and the appropriateness of the conduct in question to the developmental level of that child.

**Q3:** Does a law enforcement agency have an affirmative obligation to share with a local department of social services information it has received identifying other children who may have had contact with an accused abuser?

**A:** The child abuse law does not specify the types of information to be shared among agencies, but it clearly contemplates coordinated investigation and information-sharing among involved agencies.

**Q4:** How is the duty to investigate an allegation of child abuse affected by the passage of time?

**A:** There is no statute of limitations for the crime of child abuse. The child abuse law requires reporting any act of child abuse, regardless of when the alleged abuse occurred or the current age of the victim. However, agencies have reasonable discretion to determine the appropriate response when information is brought to their attention.

**Q5:** Is the handling of a child molestation case affected by the fact that the alleged abuser is a recent immigrant from a country with a high rate of AIDS?

**A:** There is no legal justification to vary the intensity of a criminal investigation based on the national origin of the accused. However, if an abuser has been exposed to AIDS or some other sexually transmitted disease, it would be appropriate for a local department to consider that fact in obtaining treatment for any victim.

**Q6:** What criminal background checks are required for volunteers at day care centers?

**A:** A day care center *may* require volunteers to submit to criminal background checks, but background checks are not mandated by law.

**Q7:** Do parents of children who may have been in the care or custody of a convicted child abuser have a right to know of the investigation and conviction?

**A:** Parents of a child who has allegedly been abused are generally notified within 24 hours after a report of abuse. However, there is no statutory reporting obligation with respect to parents of other children. Confidentiality provisions in the child abuse law limit the ability of a local department of social services or a police department to inform third parties about allegations of abuse. Court records are generally public, except that records of a juvenile proceeding are confidential under juvenile law.

*Letter to  
Delegate Pauline H. Menes  
March 21, 2001*

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## **FIREARMS RESPONSIBLE GUN SAFETY ACT OF 2000**

The Chief Counsel, Opinions and Advice, responded to a series of 13 questions involving the Responsible Gun Safety Act of 2000.

*Letter to  
Delegate Kevin Kelly  
January 26, 2001*

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## **FIRST AMENDMENT**

### ***Establishment Clause ) State Debt***

**Question:** Is there any constitutional objection to HB 279 (2001), a bond bill that would grant proceeds to the Islamic Society of Baltimore for the



purpose of constructing a community learning center?

**Answer:** No. Although the grantee of HB 279 is an organization that conducts religious services, the bond proceeds would be used for constructing a community learning center that would be used for secular activities. (HB 279 did not pass.)

*Letter to  
Delegate James W. Campbell  
February 15, 2001*

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### ***Grant Standards for Films***

**Question:** Proposed legislation would have mandated that the Director of the Maryland Film Office (“MFO”) form a Media Crisis Management Team to handle any instance in which the work of the MFO injured the good name of a Maryland community. This team, which would have supervised strategies designed to mitigate the damage and could have directed a State grant to the injured community, would have been required to include a member of the community’s delegation to the General Assembly. The bill would also have required the MFO to develop criteria for awarding financial assistance for the production of films and other media projects. These criteria would have been required to give preference to projects that “contain wholesome depictions of Maryland life ... or ... [are] oriented toward reform of ongoing problems facing the citizens of Maryland.” Would the proposed legislation have been constitutional?

**Answer:** Having a member of the General Assembly participate in the decision about whether an injured community should receive a direct grant of State funds would present a possible separation of powers conflict. Moreover, while the preference for films oriented toward reform of ongoing Maryland problems would be content-based and therefore a permissible means of selecting activity for State subsidy, the preference for films that “contain wholesome depictions of Maryland life” would involve viewpoint discrimination and would therefore run afoul of the First Amendment.

*Letter to  
Delegate Louise V. Snodgrass  
February 19, 2001*

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### **JUVENILE CAUSES**

The Court of Appeals recently held that the failure of a State’s Attorney to file a delinquency petition within 30 days after referral from an intake officer required that a late-filed petition be dismissed with prejudice.

**Q1:** If a court determines that “good cause” exists to extend the time for filing a juvenile petition, is there a limit on the length of any extension?

**A:** There is no explicit limit in the statute, nor does any case set a limit. The appropriate length of an extension would depend on the facts of the case and the nature of the “good cause.” In addition, the statute of limitations for the offense would set an outside limit.

**Q2:** If the State’s Attorney returns the petition to the Department of Juvenile Justice for further action, does this toll the 30-day period?

**A:** No.

*Letter to  
M. Kenneth Long, Jr., Esquire  
January 16, 2001*

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### **LABOR RELATIONS PREEMPTION**

**Question:** Would proposed legislation prohibiting a hospital from using State funds provided by the Medicaid program for “anti-union activities” be preempted by the National Labor Relations Act?

**Answer:** Yes.

*Letter to  
Senator Thomas Bromwell  
January 23, 2001*

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## LOCAL IMPACT FEES

**Question:** May Anne Arundel County levy a county-wide impact fee, proceeds of which would be used for public improvements necessitated by development?

**Answer:** A public local law enacted by the Maryland General Assembly in 1986 authorizes Anne Arundel County to levy such a county-wide fee.

*Letter to  
Delegate John R. Leopold  
January 24, 2001*

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## MUNICIPAL ANNEXATION PROPERTY TAX

**Question:** In connection with the annexation of a nearby development, the City of Annapolis is considering granting a ten-year, non-transferable property tax abatement to residents of the area to be annexed. Because the tax relief would be non-transferable, disparity would develop over time among residents within the annexed area. Would such an abatement be constitutional?

**Answer:** The tax abatement would not violate the Equal Protection Clause of the Fourteenth Amendment if adequate justification for any disparate tax treatment within the annexed area were provided in the legislation adopting the abatement. However, the ten-year term of the non-transferable abatement raises an issue regarding lack of uniformity under Article 15 of the Maryland Declaration of Rights. It is not clear that a court would find the abatement constitutional under that provision.

*Letter to  
Honorable Dean L. Johnson  
February 15, 2001*

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## OPEN MEETINGS ACT

**Question:** May members of the House Ways and Means Committee meet in closed session with a representative of the Turkish government to discuss HJR3/SJR3 (Maryland Day of Remembrance of the Armenian Genocide)?

**Answer:** Such a meeting would be subject to the Open Meetings Act if at least a quorum of the Committee, a public body, were present. Even though a joint resolution does not have the force of law, it does express public policy, and its passage could be a legislative function. Alternatively, consideration of the resolution would constitute an advisory function.

*Letter to  
Delegate Sheila E. Hixson  
February 12, 2001*

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## STATE WATERS CHESAPEAKE BAY AND COASTAL BAYS

**Question:** Who owns the waters of the Chesapeake Bay and coastal bays?

**Answer:** Subject to grants made to private parties before 1862, the Chesapeake Bay and coastal bays (such as Assawoman Bay), as well as the land under these waters, are owned by the State for the benefit of the public.

*Letter to  
Delegate Dan K. Morhaim  
January 17, 2001*

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